

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

January 31, 1997

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
 :
v. : Docket No. CENT 94-97-M
 :
 :
WALKER STONE COMPANY, INC. :

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners¹

DECISION

BY THE COMMISSION:

¹ Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (Mine Act or Act), involves an alleged significant and substantial (S&S)² violation of 30 C.F.R. § 56.14105³ by Walker Stone Company, Inc. (Walker), for failure to protect a miner from hazardous motion during testing of a rock crusher following its repair or maintenance. Administrative Law Judge Roy Maurer concluded that the operator did not violate the standard. 17 FMSHRC 600, 604-05 (April 1995) (ALJ). The Commission granted the Secretary of Labor's petition for discretionary review challenging the judge's determination. For the reasons that follow, we reverse and remand.

I.

Factual and Procedural Background

On June 25, 1993, the primary impact crusher at Walker's open-pit limestone quarry in Dickinson County, Kansas, became clogged with rock, causing its drive motor to stall. 17 FMSHRC at 600-02; Tr. 191. The primary impact crusher is located below a hopper into which trucks dump loads of rock. Tr. 30-33. The crusher is powered by a diesel motor, which turns a rotor inside the crusher. Tr. 27. As the rotor turns, rock is tossed inside the crusher housing until it breaks into pieces small enough to drop out of the crusher onto a splash pan and conveyor belt, which transports the rock for further processing. 17 FMSHRC at 602 n.1; Tr. 33-35, 38-39, 219, 225-26. When rock becomes lodged inside the crusher, it prevents the rotor from turning and stalls the drive motor, rendering the crusher inoperable until the rock is removed. Tr. 45, 62-63, 231-32.

Rock frequently clogged the crusher and had clogged it earlier that day. 17 FMSHRC at 602, 607. As usual when this occurred, the crusher operator, Roy Brooner, changed the signal light at the hopper from green to red to indicate to the truck drivers to stop dumping their loads and to help him unclog the crusher. *Id.* at 602. Truck drivers Danny Boisclair, Bill Scott, and Frank Esterly arrived at the scene. *Id.* at 602-03. Boisclair and Scott entered the interior of the

² The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard

³ Section 56.14105 states:

Repairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion. Machinery or equipment motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are effectively protected from hazardous motion.

crusher and, using a sledgehammer, broke up large boulders that were resting on top of the rotor. *Id.* at 602. Upon their exiting the crusher, the crusher operator attempted to jog the rotor to see if it had been unclogged. *Id.* The rotor did not turn, so Scott, after conferring with the crusher operator, went underneath the rotor to see if rock was lodged in the area of the splash pan. *Id.* at 602-03. Unbeknownst to the crusher operator, Boisclair reentered the interior of the crusher. *Id.* at 603. Esterly followed Boisclair but remained just outside the crusher. *Id.* While Scott cleared rock from under the rotor, Boisclair used his hunting knife to remove rock that was lodged between the top of the rotor and the crusher housing. *Id.* Esterly observed Scott working below and asked him if he needed help. *Id.* Scott responded that he thought he had removed the rock that was clogging the rotor and that he was ready to leave. *Id.* Esterly told Boisclair to hurry and get out of the crusher because Scott was done. *Id.* Boisclair began to exit the crusher but, before he was out, Scott told the crusher operator that the rotor was clear and the crusher operator jogged the rotor. *Id.* The rotor turned and Boisclair was pulled between the rotor and the crusher housing, causing massive injuries to his upper and lower torso that resulted in his death. *Id.*

The next day, Roger Nowell and Lloyd Caldwell, inspectors from the Department of Labor's Mine Safety and Health Administration (MSHA), began an investigation of the accident. 17 FMSHRC at 603; Gov't Ex. 1. Based on the results of the investigation, Inspector Nowell issued Walker Citation No. 4337450, pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging an S&S violation of section 56.14105 for failure to protect Boisclair from hazardous motion during testing of the rotor following removal of the obstruction. 17 FMSHRC at 603-04; Gov't Ex. 2. In addition, Nowell issued Walker Citation No. 4337451, pursuant to section 104(a), alleging an S&S violation of 30 C.F.R. § 56.14200⁴ for failure to warn Boisclair before jogging the rotor. 17 FMSHRC at 603, 605; Gov't Ex. 3. The Secretary subsequently proposed civil penalty assessments of \$9,000 for each of the alleged violations and Walker challenged the proposed assessments.

Following an evidentiary hearing, the judge concluded that section 56.14105 is inapplicable to the facts of this case. 17 FMSHRC at 605. He based his determination on his finding that, under the plain meaning of the standard, the phrase "repairs or maintenance of machinery or equipment" is not intended to encompass the work of removing rocks which are clogging a crusher. *Id.* at 604. The judge explained that the standard "was written to apply to repair or maintenance evolutions, as those terms are commonly used and not relatively minor annoyances that arise during the on-line production usage of the machinery or equipment, that do

⁴ Section 56.14200 states:

Before starting crushers or moving self-propelled mobile equipment, equipment operators shall sound a warning that is audible above the surrounding noise level or use other effective means to warn all persons who could be exposed to a hazard from the equipment.

not involve any adjustments, maintenance or repairs to the equipment itself.@ *Id.* at 605. The judge determined that no repairs or maintenance were being performed because miners were not doing mechanical, maintenance, or repair work or making a structural modification to the crusher. *Id.* at 604. He found that A[t]he only thing [the miners] were actually working on were the rocks, breaking them up with a sledgehammer, and/or otherwise dislodging them from the crusher.@ *Id.* Accordingly, he vacated the citation. *Id.* at 605, 607. The judge, however, concluded that Walker had committed an S&S violation of section 56.14200 and assessed a civil penalty of \$7,500. *Id.* at 605-07.

II.

Disposition

The Secretary argues that the judge erred in failing to accord deference to his interpretation of the terms Arepairs or maintenance@to include the process of removing rock that had stalled the crusher. S. Br. at 4-10. He asserts that his interpretation is consistent with the language and safety-promoting purpose of the standard. *Id.* Walker responds that the judge properly rejected the Secretary=s overly broad interpretation of the standard because its language is clear and unambiguous, and breaking up rock does not constitute repairs or maintenance of the crusher itself. W. Br. at 3-16. Walker further contends that, if the Commission accords deference to the Secretary=s interpretation, it was not provided notice that unclogging the crusher is an activity that the standard addresses. *Id.* at 12-16.

The Commission has recognized that where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning. *See, e.g., Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-43 (1984)). If, however, the standard is ambiguous, the Commission has examined whether the Secretary=s interpretation is reasonable. *See, e.g., Rochester & Pittsburgh Coal Corp.*, 12 FMSHRC 189, 193 (February 1990); *Missouri Rock, Inc.*, 11 FMSHRC 136, 139 (February 1989); *see also Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994). As the D.C. Circuit Court of Appeals has stated, deference is accorded Aonly when the plain meaning of the rule itself is doubtful or ambiguous.@ *Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984) (emphasis in original); *see also Udall v. Tallman*, 380 U.S. 1, 16 (1964); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

We conclude that the language of section 56.14105 clearly and unambiguously reaches the facts presented in this case, i.e., the breakup and removal of rocks clogging the crusher. The term Arepair@means Ato restore by replacing a part or putting together what is torn or broken: fix, mend . . . to restore to a sound or healthy state: renew, revivify . . . @ *Webster=s Third New International Dictionary, Unabridged* 1923 (1986). The term Amaintenance@has been defined as Athe labor of keeping something (as buildings or equipment) in a state of repair or efficiency: care, upkeep . . . @and A[p]roper care, repair, and keeping in good order.@ *Id.* at 1362; A

Dictionary of Mining, Mineral, and Related Terms 675 (1968). That the miners were trying to dislodge rock rather than working on the motor or other parts of the crusher does not remove the activity from the definition of repair or maintenance within the meaning of section 56.14105. The broad language of section 56.14105 does not limit the types of repairs or maintenance of machinery or equipment that are included within its scope. In this case, it is undisputed that the obstructing rock caused the crusher's drive motor to stall, rendering the crusher defective or inoperable until the rock was removed. The purpose of Boisclair's work was to unclog the malfunctioning crusher and restore it to functioning condition. 17 FMSHRC at 602-03. The removal of rock was necessary to restore [the crusher] to a sound state or keep [it] in a state of repair or efficiency. Whatever the definitional distinctions between repair and maintenance, the effect of removing the rock was to eliminate the malfunctioning condition and enable the crusher to resume operation. In our view, the removal of rock to restore the crusher to working condition is clearly covered by the broad phrase repairs or maintenance of machinery or equipment, and, therefore, the standard adequately expresses the Secretary's intention to reach the activity to which he applied it.

We find unpersuasive Walker's reliance on *Southern Ohio Coal Co.*, 14 FMSHRC 978 (June 1992), to support the judge's determination that the activity of removing rock from the crusher is not repair or maintenance. W. Br. at 6-7. In that case, the Commission concluded that the activity of extending a conveyor belt was not maintenance within the plain meaning of 30 C.F.R. ' 75.1725(c).⁵ 14 FMSHRC at 982-83. The Commission reasoned:

[T]he belt move was not designed to prevent the belt from lapsing from its existing condition or to keep the belt in good repair but, rather, to increase its usefulness [N]o work was performed . . . to keep the belt in the same condition that it was in the day before, . . . no deteriorating condition was being upgraded, and . . . the belt would run without adding additional length to it. . . . [T]he belt move did not preserve the ability of the existing belt to convey material. The belt was not in need of upkeep. Instead, the belt move was an improvement of the belt system

Id. at 983 (citations omitted). Here, in contrast, the operation of the crusher had ceased due to a malfunction; removal of rock was necessary to restore the crusher to the same condition that it was in before it became clogged; the malfunctioning condition was being eliminated; the crusher would not operate without removal of rock; and removal of rock was necessary to restore the ability of the crusher to process material. Thus, we conclude that the activity of extending a conveyor belt is readily distinguishable from that of removing rock that is clogging a crusher.

Based on the foregoing, we conclude that the judge erred in determining that section 56.14105 is inapplicable to the facts of this case. Accordingly, we reverse the judge's

⁵ Section 75.1725(c) is an underground coal standard similar to section 56.14105.

determination.⁶

⁶ In light of our conclusion that the standard is clear, we do not reach the question of whether the Secretary's interpretation is reasonable and entitled to deference.

Having determined that Boisclair's and Scott's efforts to dislodge rock constitute repair or maintenance, we next consider whether the operator violated the standard by failing to protect Boisclair from hazardous motion during testing of the rotor. The record indicates that activation of the crusher was necessary to test it. Tr. 165, 188. Moreover, Walker does not dispute that the crusher operator failed to accurately account for all employees present before he jogged the rotor and, therefore, that Boisclair was unprotected from hazardous movement of the crusher machinery.⁷ Thus, we conclude that the record as a whole supports no other conclusion than that the Secretary established a violation of section 56.14105. In addition, we conclude that the violation was S&S. Clearly, it was a significant contributing cause to the fatal accident.⁸ Because the record as a whole allows only one conclusion, we need not remand the issues of violation and S&S to the judge. *See American Mine Services, Inc.*, 15 FMSHRC 1830, 1834 (September 1993) (citing *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 961 (D.C. Cir. 1984) (remand would serve no purpose because evidence could justify only one conclusion)).

In sum, we conclude that the judge erred in determining that section 56.14105 is inapplicable to the facts of this case. We further conclude that the Secretary proved that Walker violated the standard and that the violation was S&S. Accordingly, we remand the matter to the judge for assessment of an appropriate civil penalty.

⁷ Instead, Walker contends that it had policies that prohibited employees from working in the crusher alone and from working above other employees. 17 FMSHRC at 606. Walker argues that Boisclair violated its policies when he reentered the crusher to perform work above Scott. Tr. 202-03, 213-15; W. Post-Hearing Br. at 4-5. Although Walker's purported reliance on its policies is a factor that may be considered in determining the level of negligence for purposes of assessing the penalty, it has no bearing on whether the operator violated the standard. As the Commission has frequently observed, the Mine Act imposes liability without regard to fault. *E.g.*, *Fort Scott Fertilizer - Cullor, Inc.*, 17 FMSHRC 1112, 1115 (July 1995).

⁸ We note that, in affirming the violation of section 56.14200, which arose from the same facts as the violation at issue, the judge concluded that such violation was S&S.

III.

Conclusion

For the foregoing reasons, we reverse the judge's determination that section 56.14105 is inapplicable, find an S&S violation, and remand for penalty assessment.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner